

STATE OF NEW YORK

STATE TAX COMMISSION

|   |   |                      |
|---|---|----------------------|
| In the Matter of the Petition                     | : |                      |
| of  | : |                      |
| Upstate United Group, Ltd.                        | : |                      |
| for Redetermination of a Deficiency or Revision   | : | AFFIDAVIT OF MAILING |
| of a Determination or Refund of Corporation       | : |                      |
| Franchise Tax under Article 9A of the Tax Law for | : |                      |
| the Fiscal Years Ended 9/30/82 & 9/30/83.         | : |                      |

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 13th day of September, 1985, he served the within notice of Decision by certified mail upon Upstate United Group, Ltd., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Upstate United Group, Ltd.  
3 Chapin Pkwy.  
Buffalo, NY 14209

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this  
13th day of September, 1985.

David Parchuck

William A. Haggard

Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Upstate United Group, Ltd. :  
for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Corporation :  
Franchise Tax under Article 9A of the Tax Law for :  
the Fiscal Years Ended 9/30/82 & 9/30/83. :  
:

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AFFIDAVIT OF MAILING

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 13th day of September, 1985, he served the within notice of Decision by certified mail upon Paul T. Clark, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Paul T. Clark  
Clark & Koller  
1325 Union Rd.  
West Seneca, NY 14224

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this  
13th day of September, 1985.

David Parchuck

James A. Hagel

Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK  
STATE TAX COMMISSION  
ALBANY, NEW YORK 12227

September 13, 1985

Upstate United Group, Ltd.  
3 Chapin Pkwy.  
Buffalo, NY 14209

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090(a) of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance  
Law Bureau - Litigation Unit  
Building #9, State Campus  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Paul T. Clark  
Clark & Koller  
1325 Union Rd.  
West Seneca, NY 14224  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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|   |   |          |
|---|---|----------|
| In the Matter of the Petition                   | : |          |
| of  | : |          |
| UPSTATE UNITED GROUP, LTD.                      | : | DECISION |
| for Redetermination of a Deficiency or for      | : |          |
| Refund of Corporation Franchise Tax under       | : |          |
| Article 9-A of the Tax Law for the Fiscal Years | : |          |
| Ended September 30, 1982 and September 30,      | : |          |
| 1983.   | : |          |

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Petitioner, Upstate United Group, Ltd., 3 Chapin Parkway, Buffalo, New York 14209, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the fiscal years ended September 30, 1982 and September 30, 1983 (File No. 46203).

A formal hearing was held before Paul B. Coburn, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on February 4, 1985 at 1:15 P.M. Petitioner appeared by Clark & Koller, C.P.A.'s (Paul T. Clark, C.P.A. and Barbara Arnold, C.P.A.). The Audit Division appeared by John P. Dugan, Esq. (Deborah Dwyer, Esq., of counsel).

ISSUE

Whether petitioner was entitled to exemption from corporation franchise tax as an electing subchapter S corporation for its fiscal years ended September 30, 1982 and September 30, 1983.

FINDINGS OF FACT

1. On February 4, 1983, the Audit Division issued to petitioner, Upstate United Group, Ltd. ("UUG"), a Notice and Demand for Payment of Corporation Tax Due for the fiscal year ended September 30, 1982 in the amount of \$250.00 plus penalty and interest.

2. On January 25, 1984, the Audit Division issued to UUG a Notice and Demand for Payment of Corporation Tax Due for the fiscal year ended September 30, 1983 in the amount of \$250.00.

3. Petitioner filed a "Form 2553 - Election by a Small Business Corporation" dated December 14, 1981 with the Internal Revenue Service ("IRS"). Said form was received by the IRS on or about December 18, 1981 and the form and notice of its reception was returned by the IRS to UUG by letter dated February 6, 1982.

4. UUG filed a Corporation Franchise Tax Report, form CT-3, for the fiscal year ended September 30, 1982 on or about December 15, 1982. That return indicates that UUG had not filed a form CT-6 to be an electing small business and showed a tax due of \$250.00 from UUG.

5. On or about February 28, 1983, petitioner's accountants forwarded to the Department of Taxation and Finance ("Department"):

- a) a "corrected" form CT-3 for UUG for the year ended September 30, 1982 which form indicated that UUG had filed a form CT-6 to be an electing small business;

- b) a photocopy of a form CT-6; and

- c) a copy of the approved Federal form 2553 indicating that UUG was a small business corporation for Federal purposes.

6. In a letter dated June 16, 1983, the Department's Processing Division notified UUG that it had no record of having previously received an election form CT-6.

7. In a letter dated July 5, 1983, UUG's accountant forwarded to the Department a completed form CT-6 for UUG, signed and dated June 27, 1983 and marked as "received" by the Department's Corporation Tax Bureau on July 8, 1983.

8. UUG filed a Corporate Franchise Tax Report, form CT-3, for the fiscal year ended September 30, 1983 on or about December 5, 1983.

9. It was the practice of petitioner's accounting firm to prepare both the Federal and State election forms and to have the client execute both elections at the same time. The accounting firm did so prepare both a Federal form 2553 and a New York State form CT-6 and forwarded both to petitioner. The accounting firm relied upon the taxpayer to complete and file such forms.

10. Petitioner asserts that a "Form CT-6 - Election by Shareholders of a Small Business Corporation for New York State Personal Income Tax and Corporation Franchise Tax Purposes" was properly filed with respect to UUG for its fiscal year ended September 30, 1982, and that any failure of the Department to so recognize such filing is due to shortcomings of either the U.S. Postal Service in the delivery thereof or the Department in the receipt thereof.

#### CONCLUSIONS OF LAW

A. That Tax Law section 209.8, as in effect during the period in question, permitted shareholders of a corporation which had made an election under subchapter S of the Internal Revenue Code to elect to be taxed on the corporation's items of income, loss, deduction, etc., as specified, under the personal income tax law (Article 22), with the corporation thereby becoming exempt from corporation franchise tax (Article 9-A). This provision pertained to corporate taxable years beginning on or after January 1, 1981, and required that every shareholder of the corporation make the election to be taxed, as specified, under Article 22.

B. That Tax Law section 660(d)(3), as in effect during the period in question, provided that the aforementioned election of subchapter S treatment by the shareholders of the corporation, for any taxable year beginning on or

after January 1, 1981 and ending prior to December 31, 1982, was to be made within nine months from the beginning date of such taxable year.

That in order for petitioner to have been exempt from corporation franchise tax for the fiscal year ended September 30, 1982, its shareholders were required to make the necessary election by filing form CT-6 within nine months of the October 1, 1981 commencement of petitioner's taxable year.

C. That Tax Law section 660(d)(1), as in effect during the period in question, provided that the aforementioned election of subchapter S treatment by the shareholders of the corporation with respect to a taxable year of such corporation was to be made at any time during the preceding taxable year of such corporation or at any time during the first seventy-five days of such corporation's taxable year.

That in order for petitioner to have been exempt from corporation franchise tax for the fiscal year ended September 30, 1983, its shareholders were required to make the necessary election by filing form CT-6 during the first seventy-five days of the petitioner's taxable year beginning October 1, 1982 or at any time during its preceding taxable year ended September 30, 1982.


D. That petitioner has failed to prove that the necessary elections were made within the specified time periods so as to entitle it to exemption from the corporation franchise tax pursuant to section 209.8 of the Tax Law for its fiscal years ended September 30, 1982 and September 30, 1983.

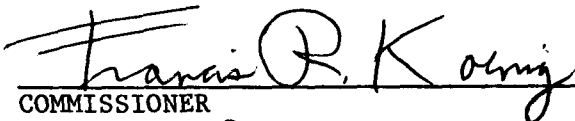
E. That the petition of Upstate United Group, Ltd. is hereby denied and the notices and demands for payment of corporation taxes due dated February 4, 1983 and January 25, 1984 are sustained.

DATED: Albany, New York

STATE TAX COMMISSION

**SEP 13 1985**

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER